83-17

No. 83-77



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

**DONNA COCKRUM and LEON COCKRUM,**

vs.

**DR. GEORGE BAUMGARTNER and UNKNOWN LABORATORY,**

*Respondents.*

and

**EDNA RAJA and AFZAL RAJA,**

*Petitioners,*

vs.

**MICHAEL REESE HOSPITAL AND MEDICAL CENTER,**

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Illinois**

## RESPONDENTS' BRIEF IN OPPOSITION

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## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

*United States Supreme Court Decisions*

*State Court Decisions*



*Statutes*

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## STATEMENT OF THE CASE

These two cases, consolidated by the Illinois Appellate Court, First District for appeal purposes, are medical malpractice actions filed in the Circuit Court of Cook County against a physician and a hospital. In both cases it was alleged that but for certain negligence of the respondents, each of the female petitioners would not have borne a child.

Respondents moved to strike from the lawsuit that portion of the petitioners' prayer for damages seeking recovery of all expenses which would be incurred in raising and educating the unwanted children to adulthood. The Circuit Court of Cook County granted respondents' motions to dismiss and struck the prayer for damages which sought child raising expenses. The other damages sought (pregnancy related expenses) were not challenged.

Petitioners[1] appealed to the Illinois Appellate Court, First District which reversed the granting of respondents' motions to dismiss.

Respondents appealed to the Illinois Supreme Court which held that the expenses incurred in raising and educating the children to adulthood were not recoverable. In so holding, the Illinois Supreme Court noted that it was joining the majority of jurisdictions throughout the United States that have considered the issue. Petition for Writ of Certiorari, pp. 14a-15a. The Illinois Supreme Court relied upon well-recognized public policy considerations in rendering its opinion. Petition for Writ of Certiorari, pp. 18a-20a.

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[1] Petitioners herein, Edna and Afzal Raja were the plaintiffs in one of the two cases consolidated by the Illinois Appellate Court. The plaintiffs in the second case, Donna and Leon Cockrum, have not joined in this petition.

## REASONS FOR DENYING THE WRIT

### I.

### THE ILLINOIS SUPREME COURT'S DECISION PRESENTS NO CONSTITUTIONAL ISSUE

Petitioners' thesis is that the Illinois Supreme Court decision impinges upon a fundamental right secured by the United States Constitution by restricting the right of women to undergo sterilization procedures or abortions. Petitioners' thesis is without foundation.

The Illinois Supreme Court interpreted Illinois tort law and held that certain damages are not recoverable in these medical malpractice cases. The decision of the Illinois Supreme Court is bottomed on an interpretation of Illinois common law and reflects Illinois public policy. The decision merely delineates the spectrum of damages recoverable in a state law malpractice action involving "wrongful birth."

This Court's holdings in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973) as well as analogous holdings in *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Akron v. Akron Center For Reproductive Health, Inc.*, 51 U.S.L.W. 4767 (U.S. June 15, 1983); *Planned Parenthood Association v. Ashcroft*, 51 U.S.L.W. 4783 (U.S. June 15, 1983) and *Simopolous v. Virginia*, 51 U.S.L.W. 4791 (U.S. June 15, 1983) were not challenged in any respect by respondents. They were not, nor could they be, questioned or restricted by the Illinois Supreme Court and are not in conflict in any respect with the decision of the Illinois Supreme Court.

The fact that under Illinois law petitioners have a cause of action for negligent sterilization or a negligent

misdiagnosis of pregnancy, but their recovery does not include the actual costs of rearing and educating petitioners' healthy children does not in any way restrict, prevent or impede petitioners or any other person from obtaining an abortion or a sterilization. The simple fact is that the decision of the Illinois Supreme Court does not in any way deter a woman from exercising her right to become sterile or to have an abortion, but merely delineates the civil damages recoverable if the sterilization or abortion has not been properly performed.

In authoring the decision of the Illinois Supreme Court Justice Ward recognized this fact when he stated:

> "We do not perceive the relevance here of *Griswold v. Connecticut* (1965), 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678, and *Roe v. Wade* (1973), 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705, cited by the plaintiffs. In *Griswold*, the court invalidated a statute making the use of contraceptives an offense. The court deemed that by outlawing the use of contraceptives the State unnecessarily invaded marital privacy. In *Roe*, the court held that a woman's right to privacy is violated by a statute that prohibits all abortions that are not necessary to preserve the mother's life.
>
> The decisions appear irrelevant to the issue of whether damages may be recovered under the circumstances here for expenses after the birth of the child. The plaintiffs referred to these decisions in opposing considerations of public policy argued by the defendants and relied upon by some of the decisions we have cited. We would note that the plaintiffs themselves, as we shall show, rely upon public policy." *Cockrum v. Baumgartner*, 95 Ill.2d 193, 202, 447 N.E.2d 385, 390 (1983).

The Illinois Supreme Court decision holds that the parents of an unwanted child *can recover* damages arising out of a negligent sterilization or a negligent

misdiagnosis of pregnancy, but that the actual costs of rearing and educating the allegedly unwanted child cannot be recovered. Petitioners' attempt to cloak this interpretation of Illinois tort law with constitutional ramifications is without merit. Petitioners have failed to establish jurisdiction under 28 U.S.C. §1257(3). Indeed, this Court has previously declined to entertain an appeal in a case involving the identical issue. *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. App. 1973), *cert. den.*, 415 U.S. 927 (1974).

The law is well-settled that the United States Supreme Court will not entertain appeals from State court decisions which rest on adequate and independent state grounds.

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis*, 20 Wall. (U.S.) 590, 636, 22 L.Ed. 429, 444; *Berea College v. Kentucky*, 211 U.S. 45, 53, 53 L.Ed. 81, 85, 29 S.Ct. 33; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164, 61 L.Ed. 644, 648, 37 S.Ct. 318; *Fox Film Corp. v. Muller*, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the State and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over State judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1944).

As a general rule, the United States Supreme Court will accept as controlling the decision of the State courts upon questions of local law, both statutory and common. *American Railway, Exp. Co. v. Kentucky*, 273 U.S. 269, 272 (1926).

Nowhere has it been held that the right to privacy recognized in *Roe v. Wade*, 410 U.S. 113 (1973) controls or even affects a state's common law with regard to the spectrum of damages available in a malpractice action. On the contrary, it has been held that the right to privacy recognized in *Roe, supra*, "implies no limitation on a state's authority to make a valued judgment favoring child birth over abortion . . ." *Maher v. Roe*, 432 U.S. 464, 474 (1976). The decision of the Illinois Supreme Court rests exclusively on independent state grounds. Petitioners have not demonstrated that it falls within the jurisdiction of this Court.

Even assuming *arguendo* that the decision of the Illinois Supreme Court rested in part on federal grounds, review by this Court would not be justified. Before the United States Supreme Court will review the decision of a state court it must affirmatively appear from the record that whatever federal question is involved was necessary to the determination of the cause by the state court. Where the decision of the state court might have been either on a state ground or a federal ground and the state ground is sufficient to sustain the judgment, the U.S. Supreme Court will not undertake to review it. *Durley v. Mayo*, 351 U.S. 277, 281 (1955).

Consequently, even if a federal question was tangentially involved in this decision, review by this Court should be declined because the state grounds are sufficient to sustain the judgment. In any event, no federal issues are involved either directly, indirectly or inferentially. Accordingly, this Court should deny the petition for writ of certiorari.

## II.

## THE CONSTITUTIONALITY OF THE ILLINOIS ABORTION ACT IS NOT AN ISSUE IN THIS CASE

In a further attempt to assert an issue of constitutional importance, petitioners cite the Illinois Abortion Act. Ill. Rev. Stat. ch. 38, §81-21 (1979) and attempt to muster a constitutional challenge to that statute. This challenge is not only unfounded, but irrelevant. The Illinois Abortion Act was not relied upon or even cited in the Illinois Supreme Court's decision sought to be reviewed.

Indeed, it is ironic that in their briefs in the Illinois Appellate Court, petitioners relied on the Act and alleged that certain policy statements therein supported their position and claim for relief. (App. Ct. Brief pp. 15-16). Now that their claim for damages has not been allowed to the extent sought, petitioners seek to raise a constitutional challenge to a statute which they relied upon in the Appellate Court and which the Illinois Supreme Court did not even cite. Such an inconsistent position obviously presents no basis for a review by the United States Supreme Court. To the contrary, it is well-established that a petitioner cannot raise for the first time in a petition for writ of certiorari the constitutionality of a statute which the state court did not pass on. *Monks v. New Jersey*, 398 U.S. 71 (1970); *Street v. New York*, 394 U.S. 576 (1969).

## CONCLUSION

The Illinois Supreme Court's adoption of a rule of civil damages adopted by a majority of other states presents no constitutional issue for this Court's review. The petition for writ of certiorari should accordingly be denied.

Respectfully submitted,

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